Supreme Court, U.S.
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No. 00-305

IN THE

Supreme Court of the United States

CHILDREN'S WORLD LEARNING CENTERS, INC.,

Petitioner,

v.

VICTORIA RIZZO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

There are no questions presented because the arguments raised by Petitioner were not addressed in the judgment sought by Petitioner to be reviewed.

The Respondent Victoria Rizzo respectfully requests that the Court deny the petition for writ of certiorari to review the Fifth Circuit's En Banc judgment in *Rizzo v. Children's World Learning Centers, Inc.*, 213 F.3d 209.

THE LIMITED BASIS OF THE FIFTH CIRCUITS OPINION

The sole relevant opinion below is the opinion reported at 213 F.3d 209. This is the judgment Petitioner is requesting be reviewed. Pet. 1.

Petitioner attempts to mislead the Court by suggesting that this judgment: allocated the burden of proof; prohibits employers from inquiring into the nature and extent of a disability; prohibits employers from temporarily restructuring job assignments of a disabled employee; or, as dramatically suggested by the Petitioner, that the judgment forces employers into a game of "Russian roulette" in choosing between endangering "innocent wards" and following the law. Pet. 11, 12.

In truth, the Fifth Circuit expressly limited this opinion to the following:

> We took this case primarily to determine whether, in this fully-tried case, the district court erred in the instructions it gave the jury in Victoria Rizzo's action under the American's with Disabilities Act and, secondarily, whether the record supports the verdict.

Pet. App.1a.

THE JURY CHARGE

The Fifth Circuit recognized that the Respondent was initially given the burden of proof on the issues of direct threat. Pet. App. 4a. The Court also correctly found that neither party objected to this charge and neither challenged this instruction on appeal. *Id.*

The Court then correctly recognized that the Petitioner was also assigned the burden of proof on the issue of direct threat. *Id.* Again, the Court recognized that neither party objected to this charge. *Id.* Because of the lack of any objection, the Fifth Circuit reviewed the Petitioner's complaint regarding the charge for "plain error". Pet. App. 6a. The Court concluded that, given the judgment in *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996) ("*Rizzo I*") which stated that the employer had the burden of proof on this issue:

> In this circumstance we are therefore unable to say that the district court committed error at all. But, if we are to assume that the district court somehow committed error, it certainly was not plain or "obvious" error and we **need not resolve the burden of proof issue** raised for the first time on appeal.

[Emphasis added] Pet. App. 6a.

Petitioner does not seek to have this Honorable Court review *Rizzo I* and its judgment placing the burden of proof. Pet. 1 "Statement of Jurisdiction". In fact, the judgment sought to be reviewed explicitly states that it was not addressing the burden of proof issue. Petitioner's arguments

regarding the burden of proof on the issue of direct threat are therefore not before the Court. 28 U.S.C. § 1254(1). United States Supreme Court Rule 13.

RESPONDENT'S SAFETY SUPPORTED BY AMPLE EVIDENCE

The Fifth Circuit's En Banc judgment then addresses the sufficiency of the evidence argument regarding her ability to safely drive the children's van. It correctly concluded that the evidence "amply supports the jury's finding that Rizzo was able to drive the van safely and did not pose a direct threat to her passengers". Pet App. 7a[1]

Disregarding the hyperbole, Petitioner does not attack this portion of the judgment.

SUFFICIENT EVIDENCE OF RESPONDENT'S COOPERATION

The Fifth Circuit's En Banc judgment lastly addressed the argument that Respondent failed to produce sufficient evidence for a jury to conclude that she engaged in the interactive process. The Court first noted that the jury was instructed regarding the

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1. "Ms. Rizzo produced evidence of her safe driving history and unblemished history of supervising children without incident. Rizzo also produced evidence that CWLC evaluated her skills and gave her a driving score in excess of the minimum needed to be able to drive the van. She was experienced in life saving procedures and possessed all licenses required by the State of Texas." Pet. App. 7a.

   "Rizzo's own testimony supported the conclusion that she had no difficulty supervising children on the bus. She testified about how she used the bus's internal mirrors and how she kept order on the bus." Pet. App. 7a.

"interactive process". Pet. App. 8a. The Court correctly cited that the evidence presented, viewed in the light most favorable to the jury's verdict, supported the implied findings of the jury. Pet. App. 9a.[2]

The jury and the Fifth Circuit En Banc concluded that Respondent acted responsibly as she first waited for Petitioner to test her hearing and job performance and, second had her own audiologist examine her and produced a report of that examination to the Petitioner.

Petitioner promised Respondent that it would provide an audiologist to test Respondent's hearing but inexplicably failed and/or refused to do so. Pet. App. 9a. Respondent unilaterally provided her own audiologist's report and stated that Petitioner was free to contact this audiologist. Pet. App. 10a. Again, Petitioner failed and/or refused to do so.

The Court correctly concluded that this was sufficient evidence indicating that Respondent adequately communicated with Petitioner about her hearing impairment and the effect of this impairment on her ability to drive.[3]

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2. "It is undisputed that before the parent expressed concern that Ms. Rizzo could safely drive the van and supervise the children, CWLC knew a number of important facts: Ms. Rizzo possessed a commercial drivers license; she had taken and passed all written and performance criteria established by CWLC relating to van driving; and finally, no one had ever reported to appellant that Ms. Rizzo had failed to safely drive a van and supervise children. In fact, the parent that expressed concern about Ms. Rizzo did not observe her engaging in any unsafe practices." Pet App. 9a.

3. It is interesting to note that during the entirety of Respondent's employ, Respondent wore hearing aids and, as part of her duties, answered the Petitioner's phones with no assistive listening devices. [R. 181.]

Again, disregarding the hyperbole, Petitioner does not attack this portion of the judgment choosing inexplicably to set forth its own arguments on its evidence.

CONCLUSION

This case has been before the Fifth Circuit three times and has been tried in its entirety to a jury. In 1996, prior to trial, the Fifth Circuit in *Rizzo I* set forth: the *prima facia* case required of the Respondent: placed the burden of proof on the issue of direct threat on the Petitioner; and concluded that the Respondent had presented sufficient evidence to support her allegations that she was discriminated against in the "terms, conditions, and privileges of employment" impermissibly under the ADA. Petitioner did not seek review of this judgment and does not do so now. The judgment sought by Petitioner to be reviewed expressly limits its opinion and expressly avoids review of *Rizzo I's* holding on the burden of proof.

The sole judgment at issue concerns the requirement of objections to jury charges, the consequences for failing to object, and sufficiency of the evidence arguments. Given the nature of the judgment and the Petitioner's failure to show how, or why, the judgment was incorrect, and further how this judgment has any far reaching effect, this Honorable Court should DENY the Petition for Writ of Certiorari.

Respectfully submitted,

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